IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1837

JOHN ELLIS, JAMES CARTY, JAMES CURLEY,
WILLIAM JONES, JAMES CROWN,
ROSEBOROUGH McMILLAN, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITIONERS' REPLY BRIEF

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Richard A. Sprague
Edward H. Rubenstone
Counsel for Petitioners

Suite 400, Wellington Building
135 South 19th Street
Philadelphia, PA 19103
(215) 561-7681

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

TABLE OF CITATIONS

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1837

JOHN ELLIS, JAMES CARTY, JAMES CURLEY,
WILLIAM JONES, JAMES CROWN,
ROSEBOROUGH MCMILLAN, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITIONERS' REPLY BRIEF

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Various statements in respondent's brief in opposition to the instant Petition for Certiorari illustrate the government's continuing attempt to confuse and obfuscate the facts and issues which are central to this prosecution. Indeed, these assertions, many of which relate directly to critical areas of the government's case, are patently incorrect, and, when scrutinized, highlight the government's inability to sustain its position on the basis of the record below. As such, petitioners believe that a short reply to the

government's brief is warranted in order to point out these inaccuracies to the Court and to underscore, in that light, the need for review of petitioners' convictions by this Court.

1. On page 3 of its brief, the government states that Robert Wilkinson "was convicted on 5 counts of murder *on the basis of his completely fabricated statement.*" (emphasis added) This assertion is totally incorrect. The fact is that the confession given by Wilkinson upon being interrogated by the police was suppressed in the state prosecution proceedings. The trial record is unequivocal and Wilkinson himself verified this very point. (A. 239a) At that trial, an eyewitness, Nelson Garcia, testified that Wilkinson threw the fatal fire bomb that took the lives of five (5) members of the Santiago family, (A. 212a)[1] and Wilkinson was convicted on the basis of this testimony alone.

2. The government makes numerous assertions, at pages 3 through 6 of its brief, that certain of the petitioners physically abused and threatened various suspects and witnesses during the interrogations. However, the jury did not convict any of the petitioners on any substantive count of the indictment. The convictions in this case were based solely on the conspiracy count. Indeed, the government's brief, in its entirety, is replete with similar assertions that witnesses were subjected to prolonged and brutal beatings by one or more of the petitioners, to the extent that, on page 5 of that brief, it is asserted, without qualification, that McGinnis signed a confession after being beaten by petitioners Carty and McMillan. The impropriety and inaccuracy of this statement is clear in light of the fact that both Carty and McMillan were acquitted of this charge by the jury.[2]

1. It was this eyewitness's recantation (A. 78a) that ultimately led to the reversal of Wilkinson's conviction.

2. It is worth emphasizing that the Court of Appeals makes this same statement in its Opinion, again despite the jury's not

3. In an apparent attempt to mislead this Court or simply to strengthen the highly vulnerable position which it has adopted throughout this prosecution, the government, in its factual discussion, relies upon the testimony of Judith Cucinotta to the effect that she "overheard conversations between the detectives indicating they were acting in concert," (Government's Brief, at 5), the clear inference being that it was petitioners' discussions which were overheard by Cucinotta, thereby buttressing the government's conspiracy theory. However, Judith Cucinotta never testified that any of the petitioners were involved in this discussion, and the government has never presented any evidence to the effect that the alleged conversations related to the purported conspiracy or even the same events as are charged in this case. Along this same line, the government, in summarizing the testimony of John and Nancy McCandless, states that "three detectives requested that they go to headquarters." (Government's Brief, at 5) The clear implication of the government's recital of these facts is that this conduct was carried out by some of the petitioners and was improper or illegal in some manner. However, it goes without saying that this is proper procedure in a homicide investigation and it is even more evident that the petitioners in this case are nowhere identified as being parties to this particular action.

Despite the paucity of facts to support a conspiracy verdict, the government, throughout its brief, attempts to substantiate its conspiracy theory through the use of inaccurate statements of fact and innuendo while ignoring the facts of record in this case. Without repeating the arguments set forth in the Petition for Certiorari, it is evident, after an examination of respondent's case as set forth in its brief, that no evidence was presented at trial

Footnote 2—*Continued*
guilty verdict on this substantive count. For an extended review and criticism of the Third Circuit's Opinion in this case, see pages 25-28 of the Petition for Certiorari.

upon which any court could properly conclude that the six petitioners were engaged in a single conspiracy to violate 18 U.S.C. §241. It will be tragic if this Court allows the convictions of six career police officers to stand on a record as bereft of evidence supporting the convictions as is this one.

4. In addressing petitioners' contention that the federal immunity statute was abused in this case and that petitioners were thereby prejudiced, the government again presents alleged facts to the Court which are completely inaccurate and which contradict the trial record. Petitioners contend that the government's decision to grant immunity to two prosecution witnesses upon completion of their direct examination and during cross-examination, solely to protect the direct testimony of these witnesses, violated the federal immunity statute, 18 U.S.C. §6001 *et seq.*, and prejudiced petitioners' sixth amendment rights. On page 9 of its brief, the government states:

> "*At the outset of their cross-examination,* the Court ruled that these witnesses could be questioned regarding their participation in the firebombing incident, a matter as to which they each possessed a valid claim of privilege against self-incrimination." (emphasis added)

The above statement is plainly in error. Before witness Hanley testified on direct examination, the prosecutor was fully aware that Hanley intended to invoke his fifth amendment rights, and that defense counsel intended to cross-examine the witness in areas where he would invoke the privilege. Most significantly, the trial judge himself, *prior to the commencement of direct examination,* stated that he would permit cross-examination into these areas and suggested that the prosecutor grant immunity to the witness prior to direct examination. (A. 676-686a) The prosecutor rejected the judge's suggestion and made a

conscious decision to call Hanley to the stand without first granting immunity to him, knowing full well that, on cross-examination, Hanley would invoke his fifth amendment rights. The prosecutor's decision was made in flagrant disregard of the federal immunity laws and at a point in time when he was keenly aware that defense counsel would move to strike the non-immunized testimony of the witness if, on cross-examination, the witness took the fifth amendment. (A. 682a) Similar events occurred prior to and during the direct and cross-examination of prosecution witness Cucinotta. (A. 1262a-1266a; 1302a-1306a).

Both Cucinotta and Hanley ultimately claimed their fifth amendment privileges during cross-examination. (A. 774a; 1304a-1305a) At those times, the prosecutor sought immunity for the witnesses for the sole purpose of protecting previously obtained testimony. However, at page 11 of its brief, the government again misstates the facts of record in an attempt to further support the prosecutor's untimely and improper conduct at trial:

> "The government's request was made precisely at that point in this case [when the government determines the witness is likely to refuse to testify], for it was not until cross-examination that the witnesses were likely to be probed on matters implicating them in the firebombing."

A review of the record reveals the inaccuracy of this statement. The government was aware, prior to the commencement of direct examination of these witnesses and, in fact, prior to the commencement of trial, that these witnesses would refuse to testify if questioned as to events relating to the firebombing, had engaged in discussions with counsel for both witnesses regarding this matter, and had been told by the trial judge that cross-examination into these areas would be permitted. Furthermore, witness Hanley was questioned during direct examination as to

events which occurred prior to his first contact with the police (A. 748a) despite the prosecutor's assertion that no inquiry into these areas would be made on direct. The prosecutor was certainly fully aware of the scope of his direct examination, and, as noted above, was given the opportunity to seek immunization of these witnesses prior to the commencement of their direct testimony. He chose not to do so. The result of this failure was to severely prejudice petitioners' rights and to exceed the grant of authority given to the government under the federal immunity statutes, all of which is more fully discussed at Point III of petitioners' Petition for Certiorari.

Under the practice employed in this case, a prosecutor would have the ability to proceed with direct examination without first granting immunity to a cooperative witness and would then be in the position to employ the immunity grant as a shield solely to protect the witness' prior testimony. This "fast and loose" employment of such a powerful tool as immunity cannot be permitted if the rights of defendants are to be accorded any protection at trial.

If this Court condones the manner in which the government employed its immunity powers in this case, the resultant prejudice to the rights of all criminal defendants will be immeasurable.

5. The government baldly asserts, at pages 6-7 of its brief, that "there was substantial, compelling evidence in the record of this case of petitioners criminal agreement to deprive citizens of their civil rights." Nothing in the record below supports this statement in any manner whatsoever, and the government's brief provides no basis for such a conclusion.

Petitioners do not suggest, as is implied by the government at page 7n.5 of its brief, that the evidence of conspiracy is deficient because convictions were not obtained

on the substantive counts in the indictment.[3] The heart of petitioners' argument is that there is a clear lack of evidence necessary to prove that each of the six petitioners entered into a single criminal conspiracy to violate the constitutional rights of any witness. The nature of the testimony presented at trial fully supports the conclusion that petitioners, by the very nature of their profession, were working in concert in a common endeavor to solve a crime involving the deaths of five persons. Whether one or more of the petitioners may have acted unlawfully, either on his own or in league with any other petitioner or any other person, is neither determinative or even suggestive of a finding that a single criminal conspiracy as to all six petitioners ever came into existence.

The government is fully aware of the fatal evidentiary defects of its case, so much so that it makes the following statement to this Court:

> "Moreover, even if the government showed separate agreements among petitioners to violate the victims' civil rights, it also showed the single greater conspiracy of which they were a part." (Government's brief, at 9)

The government chose to proceed with this case and the underlying indictments on the basis of a single conspiracy theory. The government's burden of proof on this theory was clearly not met at trial. For the government to even suggest, at this point, that the rationale of *Blumenthal v. United States*, 332 U.S. 539 (1947), should be applied here and that the inference of a single conspiracy should be drawn out of proof of separate agreements is indicative of the government's tendency to abuse the conspiracy statutes and results in the very dangers against which so

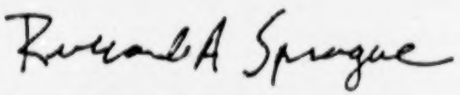
---

3. Indeed, petitioners fully recognize that a conspiracy conviction can stand despite acquittals as to the substantive charge. *United States v. Rabinowich*, 238 U.S. 78 (1915).

many members of this Honorable Court have warned over the years. *E.g., Nye & Nissen v. United States*, 336 U.S. 613 (1949) (Mr. Justice Frankfurter, dissenting opinion); *Krulewitch v. United States*, 336 U.S. 440 (1949) (Mr. Justice Jackson, concurring opinion).

In light of the government's inability to respond to the instant Petition without distorting the facts of record in this case and without relying upon a theory which is at variance with the crimes charged in the indictment and for which petitioners were convicted, the requested writ of certiorari should issue.

Respectfully submitted,



Richard A. Sprague

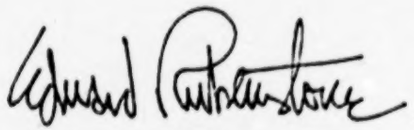
Edward H. Rubenstone
Counsel for Petitioners

Suite 400, Wellington Building
135 South 19th Street
Philadelphia PA 19103
(215) 561-7681

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 1979, three true and correct copies of Petitioners' Reply Brief on Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit were personally served on the United States Attorney for the Eastern District of Pennsylvania, 3310 United States Courthouse, 601 Market Street, Philadelphia, PA 19106. Three copies were also served on the Solicitor General, Department of Justice, Washington, D.C. 20530 by Purolator Courier.

I further certify that all parties required to be served have been served.



EDWARD H. RUBENSTONE